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IN THE
COURT OF APPEALS OF INDIANA

JOSEPH T. WILLIAMS-BEY	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 45A05-0610-PC-00593
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Salvador Vasquez, Judge
Cause No. 45G01-0507-PC-00006

April 19, 2007

MEMORANDUM OPINION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner Joseph T. Williams-Bey appeals from the denial of his petition for post-conviction relief. Specifically, Williams-Bey contends that he is entitled to relief because the trial court did not inform him that he had the right to appeal his guilty plea, that the post-conviction court erred in denying his request for the issuance of a subpoena, and that he received the ineffective assistance of trial counsel. Finding no error, we affirm the judgment of the post-conviction court.

FACTS

The only evidence offered by Williams-Bey at the post-conviction hearing regarding the facts of this case was the probable cause affidavit, which states, in pertinent part, as follows:

> Affiant, a detective with the Gary, Indiana Police Department, was involved in the investigation of a battery incident which occurred on December 28, 1994, at 425 Connecticut Street, Lake County, Indiana.
>
> I spoke with Shante Smith, a person who I believe to be truthful and credible because she spoke of facts within her own personal knowledge, and she stated that on the above date in the evening hours she was at the location along with her boyfriend, Joseph Williams, and that when he was told to leave, he became angry and he grabbed her, struggled with her briefly and bit her nose. She stated that as a result of this incident, she was taken to Northwest Family Hospital and admitted for surgery, and that she received eight (8) stitches on the left side of her nose.
>
> I have reviewed the police reports of Gary Police Officer, J. Regan, which reports are kept in the normal course of business of said department which reported that on the above date, he responded to the above hospital and spoke with Shante Smith and she informed him of the above incident and Officer Regan reported he spoke with Dr. Grene at the hospital and Dr. Grene informed him that Shante Smith's tip of her nose became separated and that the cartlidge [sic] had been bitten through and that the left side of her nose was deformed as a result of the above incident. Dr. Grene stated that she then received intravenous medications and stitches for her wounds.

Ex. 5.

As a result of the incident described above, Williams-Bey was charged with class C felony battery. Thereafter, on September 5, 1995, Williams-Bey agreed to plead guilty as charged, with no sentence recommendation. In exchange for that plea, the State agreed to refrain from filing a habitual offender count against Williams-Bey. The trial court accepted the plea agreement and sentenced Williams-Bey to a term of five years of incarceration. At the guilty plea hearing, Williams-Bey was represented by Public Defender David Olson.

On December 16, 2005, Williams-Bey filed an amended petition for post-conviction relief,[1] claiming that the trial court erred in failing to inform him of his right to appeal, that the post-conviction court erred in denying his request to subpoena the victim, and that his trial counsel was ineffective.[2]

At the post-conviction hearing that was conducted on March 1, 2006, Olson testified that he could not recall the issues in the case, but that it was his practice to review all items tendered by the State in response to the trial court's discovery order. Olson also testified that if a client desired to plead guilty, he would approach the State about an agreement, but if the client wanted to go to trial, he would certainly interview the victim and other witnesses. Finally, Olson acknowledged that in an open plea situation such as the one here, he would likely speak with the victim or the prosecutor about the victim's preferences with regard to a an appropriate sentence.

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[1] Williams-Bey's initial petition for post-conviction relief was filed on December 21, 2004.
[2] Apparently, Williams-Bey is presently incarcerated as the result of subsequent convictions.

Following the hearing, the post-conviction court denied Williams-Bey's request for relief. In particular, the post-conviction court's findings of fact and conclusions of law provided as follows:

> 7. The petitioner does challenge the effectiveness of trial counsel for refusing to [investigate] his claims of self-defense, and asserts that he would not have pled guilty had his attorney conducted a proper investigation. The court first notes that the petitioner did not confront Mr. Olson with his assertions that Mr. Olson refused to investigate self-defense, and therefore, there is a presumption that had Mr. Olson been confronted with these allegations, his testimony would not support the assertions. Furthermore, petitioner's claim that he would not have pled guilty but for counsel ineffectiveness is not credible. In fact, the petitioner was facing a sentence of eight (8) years for the Class C felony, plus an additional thirty (30) years for the habitual offender enhancement. By pleading guilty, the petitioner reduced his exposure from thirty-eight (38) years to eight (8), and the court finds that that is why he pled guilty.
>
> 8. Based on the evidence presented, we conclude that the petitioner has failed to prove that counsel's performance . . . fell below prevailing professional norms or that the petitioner was prejudiced by counsel's representation. The petitioner was not denied the effective assistance of counsel.
>
> 9. When the petitioner asserts that the court violated his constitutional right to appeal, this court assumes that he is referring to his right to take a direct appeal of his sentence, which was imposed pursuant to an "open plea." While the court, in fact, did not advise the petitioner that he had a direct appeal of his sentence, the petitioner has never attempted to file a Notice of Appeal or Petition to File a Belated Appeal. The court cannot be said to have violated the petitioner's constitutional right to appeal when the petitioner has never attempted to pursue his appellate rights.

Appellee's App. p. 5-6. Williams-Bey now appeals.

DISCUSSION AND DECISION

I. Standard of Review

As we consider Williams-Bey's argument that the post-conviction court improperly

denied his request for relief, we observe that the petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a "super appeal." Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

II. Request for Subpoena

Williams-Bey first claims that he is entitled to relief because the post-conviction court erred in denying his request to subpoena the victim, Shante Smith. Specifically, Williams-Bey argues that the post-conviction court's refusal to issue the subpoena violated his rights under the "Six [sic] Amendment Compulsory Process Clause." Appellant's Br. p. 9.

In resolving this issue, we note that it is within the post-conviction court's discretion to grant or deny a party's request for a subpoena. Allen v. State, 791 N.E.2d 748, 756 (Ind. Ct. App. 2003). We will review the trial court's decision regarding the decision to issue a subpoena for an abuse of discretion. Stevenson v. State, 656 N.E.2d 476, 478 (Ind. 1995). An abuse of discretion occurs where the trial court's decision is against the logic and effect

of the facts and circumstances before the court. Allen, 791 N.E.2d at 756.

Pursuant to Post-Conviction Rule 1(9)(b):

> If the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness's testimony is required and the substance of the witness's expected testimony. If the court finds the witness's testimony would be relevant and probative, the court shall order that the subpoena be issued. If the court finds that the proposed witness's testimony is not relevant and probative, it shall enter a finding on the record and refuse to issue the subpoena.

In this case, Williams-Bey did not submit an affidavit in accordance with the above rule. Moreover, he failed to demonstrate how Smith's testimony was relevant or probative to the post-conviction issues. Hence, Williams-Bey's claim fails.

III. Advisement of Right to Appeal

Williams-Bey argues that he is entitled to relief because the trial court did not advise him of the right to appeal his guilty plea. Notwithstanding this claim, Williams-Bey did not offer the transcript of either the guilty plea or sentencing hearing into evidence at the post-conviction hearing. Thus, the issue is waived, and Williams-Bey's argument fails. See Tapia v. State, 753 N.E.2d 581, 587 (Ind. 2001) (observing that the request for post-conviction relief was properly denied when, despite the fact that the petitioner bore the burden of proof, he presented no evidence in support of his claims). Moreover, even if the trial court did not advise Williams-Bey of a right to appeal, the post-conviction court observed that he has never attempted to file a notice of appeal or a petition to file a belated appeal. Thus, Williams-Bey has made no showing that the trial court violated his right to appeal.

IV. Ineffective Assistance of Trial Counsel

Williams-Bey claims that his trial counsel was ineffective for various reasons. In particular, Williams-Bey contends that his trial counsel: (1) did not file an answer to the trial court's discovery order; (2) failed to engage in adequate pretrial investigation and preparation; (3) was ineffective because he failed to conduct a "professional interview" of him, appellant's br. p. 12; (4) did not file any pretrial motions and failed to prepare for trial; and (5) failed to locate an expert who could testify that the bite marks on Smith's nose "were the result of falling backward," appellant's br. p. 14.

Claims of ineffective assistance of trial counsel are generally reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668 (1984). A claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Id. at 687-88. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome." Id. When a defendant claims that his counsel was ineffective for overlooking a defense, he or she must show a reasonable probability of acquittal. Segura v. State, 749 N.E.2d 496, 503 (Ind. 2001).

We also note that appellate review of the post-conviction court's decision is narrow. We give great deference to the post-conviction court and reverse that court's decision only when "the evidence as a whole leads unerringly and unmistakably to a decision opposite that

reached by the postconviction court." Prowell v. State, 741 N.E.2d 704, 708 (Ind. 2001). Although the two parts of the Strickland test are separate inquires, a claim may be disposed of on either prong. Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999). Strickland declared that the "object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." Strickland, 466 U.S. at 697.

In this case, while Williams-Bey asserts that his trial counsel was ineffective for failing to file a response to the trial court's discovery order, the record reflects otherwise. Specifically, an entry in the Chronological Case Summary on March 30, 1995, states, "DEF, BY CNSL, FILES ANS TO DISC ORD." Appellant's App. p. 72. Moreover, although Williams-Bey claims that trial counsel "never reviewed the discovery," appellant's br. p. 11, he fails to substantiate this assertion or explain its relevance. Thus, his contention that his trial counsel was ineffective on this basis fails.

As for the other claims of ineffective assistance of counsel, Williams-Bey has not supported his claims with any citations to the record, and Olson had no recollection of his actions in the case. Tr. p. 41, 45, 48. Additionally, Williams-Bey offered no evidence at the post-conviction hearing showing what evidence could have been investigated, what motions counsel should have filed, or how the filing of additional motions might have benefited him. Also, with regard to Williams-Bey's request for an expert witness, he failed to present any evidence at the post-conviction hearing that "the testimony of an expert was available or that it would have been exculpatory." Marshall v. State, 563 N.E.2d 1341, 1344 (Ind. Ct. App.

1990).

In sum, it is apparent that Williams-Bey did not produce any evidence at the post-conviction hearing that would indicate that "there is a reasonable possibility that he would have been found not guilty had he gone to trial on the charge." Toan v. State, 691 N.E.2d 477, 479 (Ind. Ct. App. 1998). Therefore, Williams-Bey's claims of ineffective assistance of trial counsel are unsubstantiated on appeal, and the post-conviction court correctly concluded that he failed to prove his claims of ineffective assistance of counsel.

The judgment of the post-conviction court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.